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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE CERVANTES, Defendant and Appellant.	H027513 (Santa Clara County Super. Ct. No. CC314806)

Defendant Enrique Cervantes was charged by information filed December 18, 2003, with lewd conduct on a child under 14 (Pen. Code, § 288, subd. (a)).[1] The information further alleged that a felony conviction of the offense would require defendant to register pursuant to section 290 and to provide two specimens of blood and a saliva sample pursuant to section 296, subdivision (a). On January 26, 2004, defendant entered a plea of no contest to the charge. On May 21, 2004, the trial court sentenced defendant to the lower term of three years in state prison. The court also ordered defendant to submit two blood and one saliva sample.

Defendant's sole contention on appeal is that requiring him to submit blood and saliva specimens pursuant to section 296 violates his Fourth Amendment right against unreasonable searches. We disagree, and therefore affirm.

[1] All further statutory references are to the Penal Code.

BACKGROUND

As defendant pleaded no contest to the charge against him, the facts underlying his conviction are taken from the probation report. On April 29, 2003, the victim, age nine, told her teacher that defendant, who is a family friend and her babysitter, asked her to get naked and she said no. On May 22, 2003, the victim told an officer that defendant had kissed her three to four times before taking off her shirt and touching her waist. The victim's mother stated that the victim exhibited unusual behavior after defendant's last visit on May 9, 2003. After defendant's arrest, he admitted kissing the victim and taking off her shirt. He also admitted that he became sexually aroused after kissing the victim and that he had his hands around the victim's waist when he kissed her.

DISCUSSION

Section 296, subdivision (a)(1), provides in pertinent part that "[a]ny person who is convicted of any of the following crimes . . . shall, regardless of sentence imposed or disposition rendered, be required to provide two specimens of blood, a saliva sample, right thumbprints, and a full palm print impression of each hand for law enforcement analysis: [¶] (A) Any . . . felony offense that imposes upon a person the duty to register in California as a sex offender under Section 290." Defendant contends that section 296 is unconstitutional in that it requires persons convicted of any of the enumerated crimes to submit to a search without any "individualized suspicion of wrongdoing." (*City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 37 (*Edmond*).) Although defendant did not object to the section 296 requirement below, the Attorney General concedes that this court may considered the merits of a challenge to a sentence which raises "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." (*People v. Welch* (1993) 5 Cal.4th 228, 235.)

Defendant contends that a search such as the one required by section 296 passes constitutional muster only if it falls within the "special needs" exception recognized in

such United States Supreme Court cases as *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, which held that a search unsupported by probable cause can be constitutional " 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " (*Id*. at p. 653 [random drug testing of student athletes upheld]; see also *Skinner v. Railway Labor Executives' Assn*. (1989) 489 U.S. 602 [alcohol and drug testing of railroad employees upheld]; *Edmond*, *supra*, 531 U.S. 32 [Fourth Amendment forbids a highway checkpoint program for general crime purposes]; *Ferguson v. City of Charleston* (2001) 532 U.S. 67 (*Ferguson*) [screening maternity patients in hospitals did not fall under the "special needs" category].) Defendant claims that because the purpose of section 296 is for "general crime-solving," it does not meet the "special needs" exception to the Fourth Amendment's requirement of individualized suspicion to justify a search. (*Ferguson*, *supra*, 532 U.S. 67.)

Defendant acknowledges that this court has recently rejected this claim in *People v. Adams* (2004) 115 Cal.App.4th 243 (*Adams*). He further acknowledges that other courts have also rejected this claim. (See, e.g., *People v. King* (2000) 82 Cal.App.4th 1363, 1370 (*King*) [noting the defendant's failure to cite any case against providing blood samples pursuant to section 296]; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505 (*Alfaro*) [noting consistent rejection of similar challenges by courts in other jurisdictions].)

In *Adams*, we followed *King* and *Alfaro*, concluding that section 296 served a compelling governmental interest that outweighed the diminished expectation of privacy of a person convicted of the enumerated crimes. (*Adams*, *supra*, 115 Cal.App.4th at pp. 257-258.) We rejected the assertion that "special needs" beyond the normal law enforcement need must be identified for an exception to the individualized suspicion requirement. (*Id*. at p. 258.) We distinguished *Edmond* and *Ferguson*, which involved

searches of the general public rather than searches of convicted felons, who "do not enjoy the same expectation of privacy that non-convicts do." (*Adams, supra*, at p. 258.)

The Attorney General cites to the recent cases of *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813 (*Kincade*) and *Illinois v. Lidster* (2004) 540 U.S. 419 [124 S.Ct. 885] (*Lidster*), to further support the position that section 296 is constitutional. The *Kincade* court held that, "In light of [the probationer's] substantially diminished expectations of privacy, the minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified . . . offenders is reasonable under the totality of the circumstances." (*Kincade, supra,* 379 F.3d at p. 839, fn. omitted.)

The defendant in *Lidster* was convicted of driving under the influence of alcohol after being stopped at a highway checkpoint set up to obtain information about a recent hit-and-run accident in the vicinity. The defendant appealed on the ground that the checkpoint violated his Fourth Amendment rights. The Supreme Court in *Lidster* applied a balancing test, examining " 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.' [Citation.]" (*Lidster*, *supra*, 124 S.Ct. at pp. 890-891.) The court noted that the purpose of the checkpoint stop was to seek help in finding the perpetrator of a specific crime, that the police had tailored the stops properly with respect to time and place to fit their investigation, and that the brief stops interfered only minimally with the public's Fourth Amendment rights. (*Id*. at p. 891.) In light of these factors, the court held that the checkpoint stop was reasonable and thus constitutional. (*Ibid*.)

The search authorized by section 296, like the stops conducted in *Lidster*, serves important law enforcement purposes beyond crime solving, including apprehension of offenders, identification of missing persons, and exoneration of innocent defendants. The

court in *King* asserted that the "ability to match DNA profiles derived from crime scene evidence to DNA profiles in an existing data bank can enable law enforcement personnel to solve crimes expeditiously and prevent needless interference with the privacy interests of innocent persons." (*King*, *supra*, 82 Cal.App.4th at pp. 1375-1376.) In *Adams*, we stated that "[d]eterrence and prevention of future criminality and accurate prosecution of past crimes are purposes served by DNA testing and courts have upheld DNA acts for the law enforcement purpose of solving crimes." (*Adams*, *supra*, 115 Cal.App.4th at p. 258.) The court in *Alfaro* held that a "minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify erroneous convictions that have occurred manifestly serves a compelling public interest." (*Alfaro*, *supra*, 98 Cal.App.4th at p. 506.)

In sum, we agree with this court's prior opinion in *Adams*, and with the holding in cases such as *King* and *Alfaro*. The requirement that defendant provide blood and saliva specimens for law enforcement identification analysis pursuant to section 296 serves compelling government interests other than a general interest in law enforcement. "There is no question but that by providing an effective means of identification, DNA testing is an efficient means of promoting the governmental interests at stake." (*King*, *supra*, 82 Cal.App.4th at p. 1378.) Furthermore, section 296 concerns a population that already has a diminished expectation of privacy. The necessary intrusion on defendant's privacy interests in obtaining the specimens is minimal, as section 299.5, subdivisions (a) and (b) "exempts all DNA and forensic identification profiles and other identification information from any law requiring disclosure of information to the public, and it makes such information confidential." (*Alfaro*, supra, 98 Cal.App.4th at p. 508.) We therefore find that the requirement that defendant provide blood and saliva specimens pursuant to section 296 did not violate the Fourth Amendment's prohibition against unreasonable searches.

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MCADAMS, J.